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MEMORANDUM

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SUBJECT: Draft Superfund Takings Guidance

Attached is the final draft of the Agency's proposed Superfund Takings Guidance. It is intended to assist Agency personnel in deciding whether specific Superfund response activities may have Fifth Amendment takings implications. Although it is being distributed to all EPA Offices of Regional Counsel, and thus you may have already seen it, we are sending you an individual copy to encourage you to offer comments and suggestions.

The first section discusses various aspects of takings law and concludes that because Superfund response actions are taken to protect public health and safety, ordinarily they do not constitute takings. The second section develops a model for determining whether a particular action constitutes a taking. We recognize that there are situations it may not cover, and solicit comments or suggestions concerning revisions or additions.

Although we hope to finalize the Guidance in the near future, the current draft is for EPA internal discussion only, and should not be distributed outside of the Agency. Please provide all comments by no later than close of business on June 9 to me at Mail Code LE-132G, Phone FTS 382-5313.

DRAFT TAKINGS GUIDANCE; May 22, 1989.
For internal review only; DO NOT CIRCULATE OUTSIDE AGENCY

Superfund provides broad authority to respond to releases of hazardous substances or contaminants into the environment. Some actions under this authority may have the effect of interfering with, restricting, or otherwise burdening uses of property. However, the Superfund can only be used to pay necessary response costs, and therefore cannot be used to compensate a property owner for the effects of response actions on his property unless such payment is mandated by CERCLA, the Fifth Amendment, or some other authority.

This Guidance focuses specifically on whether, when, and to what extent the Fifth Amendment mandates compensation. It does not attempt to address any other basis for compensating the property owner. Thus, for example, it does not consider how CERCLA §§ 101 (23), (24) authorize payment to property owners for relocation costs. Similarly, it does not consider state tort law remedies that may be available to property owners for particular injuries to their property during the course of a response action.

The Guidance briefly surveys Fifth Amendment takings law generally, and then specifically analyzes how that law applies to the various actions that may be taken in response to a release. It concludes that, under the applicable takings principles, most actions to respond to a release will not constitute compensable takings of property rights. It also develops an analytical framework for determining when a particular action under CERCLA should be characterized as a taking for which compensation would be required.

I. Takings Law

Under the Fifth Amendment, "private property [shall not] be taken for public use without just compensation." This does not prohibit the government from taking private property, but requires that it pay compensation when it does so. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California. 107 S.Ct. 2378, 2385 (1987). A "typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain." Id. at 2386. A governmental regulatory action may also constitute a taking if it "does not substantially advance legitimate state interests, or ... denies an owner economically viable use of his land." Keystone Bituminous Coal Association v. DeBenedictis, 107 S.Ct. 1232, 1242 (1987), quoting Agins v. Tiburon, 446 U.S. 255, 260 (1980).

A conclusion that a particular governmental action constitutes a taking is essentially a determination that the public at large, rather than the individual property owner, should bear the burden of the state's action. Keystone, 107 S.Ct. at 1246. This determination is ordinarily made by balancing the public and private interests at stake. Id. In conducting this balancing, the Supreme Court has been unable to develop a set formula, but instead has engaged in a series of "essentially ad hoc, factual inquiries." The Court has identified the "economic impact" of a particular action on a property owner, the extent to which the goverenment action "has interfered with distinct, investment-backed expectations ... [and] the character of the government action," as factors having particular importance. Penn Central Transportation Co. v. New York City. 438 U.S. 104, 124 (1978). If any one of these factors is sufficiently strong, it may decide a takings claim without reference to any other factor. Ruckelshaus v. Monsanto Co., 467 U.S.1001, 1005 (1984).

A. Public Health and Safety

The Court has concluded that in certain circumstances the nature of the government action is so important that further inquiry is unnecessary. Ordinarily, no taking occurs when the state is acting to "protect the public interest in health [and] the environment" or "to prevent [an] impending danger." Keystone 107 S.Ct. at 1243, 1245. See id. at 1244-46 and 1246 n. 22. See generally Miller v. Schoene, 276 U.S. 272 (1928). This rule encompasses what is often characterized as "'[t]he nuisance exception to the taking guarantee,'" and the Supreme Court has long recognized and recently unanimously reiterated its "special status" in takings law. Keystone 107 S.Ct. at 1245 n. 20, quoting Penn Central 438 U.S. at 145 (1978) (Rehnquist, J., dissenting); Keystone, 107 S.Ct. at 1256 (Rehnquist, C.J., dissenting).

In the seminal nuisance exception case, Mugler v. Kansas, 123 U.S. 623 (1887), the Court held that a state law prohibiting the manufacture or sale of liquor did not constitute a "taking" of a brewery which, because of that law, could no longer be used to brew beer. The Court based its decision on the fact that "'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community,'" and that "no individual has a right to use his property so as to ... harm others." Keystone. 107 S.Ct. at 1245, quoting Mugler, 123 U.S. at 665. No action taken under this rationale can constitute a taking: "since no individual has a right to use his property so as to create a nuisance or

otherwise harm others, the state has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." Keystone, 107 S.Ct. at 1245 n. 20. Consequently, so long as the State's action is justified and falls within the nuisance exception, the property owner is not deprived of a protectable property interest, no taking occurs, and the question of compensation does not arise. Id. at 1246, n. 22; See also id. at 1256 (Rehnquist, C.J., dissenting ("a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others.").

The nuisance exception has historically been applied most frequently to justify denying compensation for "regulatory" actions that interfere so substantially with property rights they would ordinarily be classed as takings. See Keystone. 107 S.Ct. at 1244 n. 18. However, in appropriate circumstances, the Court has applied it to state actions that effectively appropriate property. See Miller v. Schoene, 276 U.S. 272 (no compensation required when state ordered that living trees be cut down). Modern courts have also applied it to actions to remove contamination from the environment, even if those actions involve temporary physical occupation of an owner's land. Nassr v. Massachusetts, 394 Mass. 767, 477 N.E.2d 987 [1985)(cited with approval in Keystone, 107 S.Ct. at 1246, n. 22).

Originally, the nuisance exception was applied to government actions to abate a nuisance or prevent wrongful conduct by a property owner. See e.g. Haddacheck v. Los Angeles, 239 U.S. 394 (1915). However, in Miller v. Schoene, the Court explicitly recognized that the exception was not limited solely to actions to abate common law nuisances, but applied more broadly to actions to "prevent [an] impending danger." 276 U.S. at 280. It is now generally recognized that the "nuisance exception" encompasses all actions taken to protect public health and safety. See Keystone, 107 S.Ct. at 1245; First English 107 S.Ct. at 2384-85 (no taking where State acting under its authority to protect public safety); Allied General Nuclear Sciences v. U.S., 839 F.2d 1572, 1576 (Fed. Cir. 1988)(exception applies whenever property is being used "in a manner that is injurious to the safety of the general public."). The President has formally recognized the special status of actions undertaken "for purposes of protecting public health and safety." Executive Order 12630, § 3(c).

Moreover, the nuisance exception encompasses any state action to respond to a threat to public health and safety, regardless of whether the owner of the property has engaged in wrongful conduct. The Court has clearly stated that it is "the nature of the state's action [that] is critical in takings analysis." Keystone, 107 S.Ct. at 1244. In Miller, the Court upheld a statute authorizing the uncompensated destruction of trees harboring a disease which threatened nearby apple orchards, regardless of whether the owners bore any responsibility for the presence of the disease. Miller v. Schoene, 276 U.S. at 277-80.

Likewise, Superfund authorizes actions to respond to a release or threatened release without regard for the culpability of the owner of the property where the release occurs. A response action may be undertaken only as necessary to abate a threat to "the public health and the environment, thus eliminating a public nuisance." US v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 734 (8th Cir. 1986). (NEPACCO). This authority arises whenever a release occurs; thus the question of who bears responsibility for the release is irrelevant in determining whether a response action is authorized.

Moreover, any action authorized by CERCLA is undertaken to protect health and safety. This follows from the fact that CERCLA authorizes actions only in response to a release or threatened release of a substance that is "hazardous" or of a "pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare." CERCLA § 104(a)(1). This constitutes a Congressional determination that a response is necessary to protect public health and safety; an action not necessary for that purpose would not be authorized by CERCLA. Consequently so long as CERCLA authorizes a response activity, that activity ordinarily will fall within the scope of the nuisance exception.

However, it is important to recognize that not all actions taken under the police power come within the nuisance exception. Keystone, 107 S.Ct. at 1245 n.20; id. at 1256 (Rehnquist, C.J., dissenting). The police power encompasses all actions which take property for public use; only those actions that protect public health and safety come within the nuisance exception. Id. Thus it is critical to determine whether a particular action constitutes an appropriate response to a threat to public health and safety. See e.g. Executive Order 12630, § 3(c); Keystone, 107 S.Ct. at 1256 (Rehnquist, C.J., dissenting) (nuisance

exception narrow). So long as the exception properly applies, however, ordinarily no taking will be found.[1]

Closely related to the public health and safety exception is the well-established rule that the Fifth Amendment does not require compensation for actions that secure for the property owner a "reciprocity of advantage." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Where an individual is required to surrender more of his property rights than is extracted from the public at large, no taking occurs if that individual receives a full and just benefit equivalent to any burden. Monongahela Navigation Co. v. U.S., 148 U.S. 312, 325 (1893); Keystone, 107 S.Ct. at 1256 (Rehnquist, C.J., dissenting); see also Hodel v. Irving, 107 S.Ct. at 2076.

The nature of the Superfund program is such that in many cases the burdens imposed on a property owner during a response action will be closely related to the seriousness of the problem on the property and the benefits the owner derives from a cleanup. Thus a response action will benefit the owner, "restoring value to [a] property by removing the hazardous substances." NEPACCO, 810 F.2d at 734. In calculating the benefit from the response, "the value of the property must be calculated as of the time of the [alleged] taking." First English, 107 S.Ct. 2388. Thus a property's pre-response value should be assessed in light of the fact that that value may already have been diminished by the contamination.

Nevertheless, the fact that a burdened property owner may derive no specific advantage from a response action to offset any burdens on the property cannot transform an action to protect public health and safety into a compensable taking. See Miller

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[1] The Agency recognizes that the Court has not yet decided whether actions under the nuisance exception that deny a property owner all economically viable use of property would constitute a taking. Compare Miller v. Schoene, 276 U.S. 272 (destruction of trees not compensable) and Keystone, 107 S.Ct. at 1246 n. 22 ("a State need not provide compensation when it ... destroys the value of property" by actions under nuisance exception) with id. at 1257 (Rehnquist, C.J., dissenting) ("our cases have never applied the nuisance exception to allow complete extinction of the value of a parcel of property"). See also First English, 107 S.Ct. at 2384-85 (declining to resolve whether takings claim could be defeated "by establishing that [a] denial of all use was insulated [from a takings claim] as a part of the State's authority to enact safety regulations."). Similarly, as discussed below, the Court has not yet expressly decided whether an action to protect public health and safety constitutes a taking if it requires permanent physical occupation of property.

v. Schoene; see also Keystone, 107 S.Ct. at 1245 (finding reciprocity of advantage from benefits all property owners derive from living in ordered society).

B. Physical Invasion or Occupation

Governmental actions which involve an invasion or physical occupation of property constitute "a property restriction of an unusually serious character for purposes of the Takings Clause." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). Consequently, "[i]t is well settled that a 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government ... than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good... While the Court has almost invariably found that permanent physical occupation of property constitutes a taking, ... the Court has repeatedly upheld regulations that destroy or adversely affect real property interests." [quotations and citations omitted]. Keystone, 107 S.Ct. at 1244, n. 18. Indeed, in Loretto, the Court concluded that a physical occupation that is permanent constitutes "a governmental action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine," such as economic impact or investment-backed expectations. 458 U.S. at 432.

Despite this general recognition of the seriousness of physical invasions or occupations, the Court has not specifically addressed the status of invasions undertaken under the nuisance exception. The state action in Loretto (installing a television cable) clearly was not necessary to protect public health and safety and thus fell outside the nuisance exception. Moreover, because most modern takings analysis has focused on regulatory actions, the Court has not yet been confronted with a government action to protect health and safety by physically invading property; indeed, in the public health and safety area the distinction between a "regulation" and a "physical invasion" may not always be entirely clear. For example, if the Agency directly undertakes response activities at a site, it may physically intrude onto contaminated property; conversely, if the Agency succeeds in securing a responsible party response action, no physical intrusion may be necessary.

The rationale for the special status of physical invasions does not apply as strongly to actions to protect public health and safety as to other types of actions. Consequently, the per se

rule of Loretto regarding permanent physical occupations may not apply to actions to respond to releases of hazardous substances into the environment, see footnote 1, or to emergency actions. See Loretto, 458 U.S. at 430 n. 7.

The rationale for the nuisance exception applies as readily to physical invasions as to regulatory activities. If an individual has no right to use property in ways harmful to public health and safety and if state action to prevent such a use therefore does not constitute a taking, Keystone, 107 S.Ct. at 1245, n. 20, the state must have the ability to enter the property to prevent the use. Indeed, the existence of a regulation regarding use of a property would appear to imply the power to enter the property to enforce the regulation. See e.g. Miller v. Schoene (authorizing destruction of property). See also Empire Kosher Poultry, Inc. v. Hallowell, 816 F.2d 907, 915 (3rd Cir. 1987)(Keystone "strongly reasserted the authority of cases such as Miller").

In Loretto, the Court declined to address this problem. The Court conceded that a State requirement that property owners install smoke detectors or fire extinguishers on their property would be subject to the balancing employed in traditional takings analysis, rather than constituting a per se taking. 458 U.S. at 440. The Court, however, did not discuss what steps a State could take to enforce such a requirement. Id. However, in Miller, the Court upheld a statute requiring the destruction of certain diseased trees, and authorizing a state employee "to destroy the trees if the owner ... fails to do so." 276 U.S. at 247.

As this suggests, where the state has the authority to control dangerous uses of, or conditions on, property, the Takings Clause cannot reasonably be read to "require compensation whenever the State asserts its power to enforce" a regulation established under that authority. Keystone, 107 S.Ct. at 1245-46. Consistent with this, a state must be able to enter property and take necessary action to bring about compliance with a regulation to protect health and safety if the owner fails or refuses to do so. For example, a state regulation that required the installation of fire extinguishers or smoke detectors could authorize the state to install the equipment directly where a landlord fails to do so, rather than having to choose between effecting a taking or leaving the tenants unprotected until the landlord acts.

Moreover, Loretto expressly purported to be affirming, not altering, existing law. The Court characterized its holding as a

"very narrow" one, that did no more than "affirm the traditional rule" regarding takings. Id. at 441. The nuisance exception is a well-established aspect of traditional takings law. Keystone, 107 S.Ct. at 1244-46 and n. 22. Nothing in Loretto demonstrates an intent to reduce the scope of that exception. On the contrary, in Loretto the Court acknowledged that under the "traditional rule" no taking occurs when the government acts "in case of necessity." 458 U.S. at 430 n.7.

Finally, Loretto is explicitly limited to physical occupations of such a duration that they can be characterized as "permanent." Much of the Court's reasoning focuses on the qualitative difference between permanent and temporary occupations. See 458 U.S. at 426-39 and n. 17. However, the line between "permanent" and "temporary" may not always be clear. Indeed, the Court has recently recognized that "'temporary' takings which ... deny a landowner all use of his property are not different in kind from permanent takings." First English, 107 S.Ct. at 2388.

Even if Loretto applied to Superfund response actions, the Agency believes that few, if any such actions can be characterized as "permanent" in the sense of being intended and authorized to continue indefinitely, as was the case in Loretto. See 458 U.S. at 439 and n. 17. A response action can be carried out only to address a release or threatened release; once a site has been remediated, the action ceases. Certainly, all actions to investigate a release, and to plan, design, and construct a response are of limited duration. Physically invading a property and occupying it for a year and a half while cleaning up hazardous substances on that property does not constitute a taking. Nassr, 394 Mass. 767. Moreover, most remedies are of finite, even if extended duration. (e.g. treatment of contaminated groundwater for thirty years). Finally, even if a remedy is arguably "permanent" in nature (e.g. a cap) the property owner may have difficulty establishing a denial of all economically viable use of his property.

II. Compensation

Because Superfund response actions are only authorized if necessary to abate or remediate a threat to public health and the environment, such actions fall within the nuisance exception and thus ordinarily cannot constitute takings. This applies whether the response can be characterized as regulatory or requires a physical invasion. Nevertheless, in exceptional circumstances, some response activities may effect takings. The following discussion outlines factors to use in determining whether or not a particular action effects a taking and when it may be appropriate to offer upfront compensation payments.

A. Liable Parties

No party who is liable for a release under CERCLA § 107 should ultimately receive compensation for the effects of actions to respond to that release. CERCLA liability encompasses all reasonable response costs, including the cost of compensating property owners for takings claims. See § 107(a). Thus any taking claim a potentially liable party might establish would be offset by that party's liability for response costs. (and by any benefits the response action confers on the party.) As a result, it is not appropriate to use the Superfund to pay compensation to a party from whom the Agency is prepared to attempt to recover response costs.

If a PRP seeks to obtain compensation for an alleged taking in an inverse condemnation action in Claims Court, the Agency can argue that the claim is not ripe for adjudication until liability and the reasonableness of the response actions are finally determined in the enforcement case. Thus any takings award would be used to offset the party's § 107 liability. Moreover, this approach would not prejudice the rights of the property owner, who could obtain full compensation for any Fifth Amendment taking from the time it occurred. See First English, 107 S.Ct. at 2388.

B. Parties That Are Not Liable

1. Direct Response

a. Actual Contamination on Burdened Property

The Agency will not compensate a property owner for burdens imposed on the property by actions in direct response to a threat to health and safety posed by that property. Such actions fall squarely within the nuisance exception and compensation is not mandated by the Fifth Amendment. This applies without reference to whether there is any basis for asserting that the property owner is liable under CERCLA §107 or could obtain a release under §122(g). The need to respond to the problem, and the authority to do so without compensation, both depend solely on the existence of a threat to public health and safety, without regard for culpability.

The Agency also notes that ordinarily the owner of contaminated or threatened property will derive a reciprocal advantage from a response to the contamination. However, as noted above, the presence of a benefit to offset the burdens imposed on the property is not essential to the ability to act without providing compensation; even if an owner of contaminated property can establish that there is no such benefit, compensation will still be inappropriate, so long as the action is necessary as a direct response to a threat to public health and safety from that property.

b. Threat of Contamination

The same analysis also applies whether a release is threatened or actual, since CERCLA draws no legally significant distinction between the two. CERCLA authorizes actions to respond to any release, actual or threatened, so long as it is of a hazardous substance or of a pollutant or contaminant that "may present an imminent and substantial danger to the public health or welfare." § 104(a). Thus the legally significant question is whether the release may endanger public health and safety, not whether it is actual or threatened.

2. Indirect Response

However, in some circumstances there may be only an indirect relationship between the presence of a release and the response activity undertaken on a particular property. EPA clearly has authority under § 104(e) to take response actions on such property; whether a compensable taking occurs is a separate question. In analyzing that question it is critical to determine whether the specific burden inposed on the property by a particular action is directly related to the presence of contamination on the property. For example, if a particular property is being used solely because of its proximity to the site of a release, and would be used whether or not it is contaminated, the direct relationship is lacking. Similarly, where a contaminated property is used as a treatment site for waste from that property and from other properties, the direct relationship is present only as to the waste from that property. Compensation for the added burden imposed on the property solely due to the foreign waste may then be appropriate to avoid forcing a non-liable property owner alone "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. U.S., 364 U.S. 40, 49 (1960).

3. Uncontaminated Property

The general rule is that non-liable parties will be compensated for burdens imposed on uncontaminated property. However, the Agency has not yet determined whether actions it undertakes on uncontaminated property to respond to an emergency would necessarily require compensation; there may be less likelihood of a taking for actions undertaken in response to an emergency than for other actions.

4. Type of Action Taken

For compensation purposes, ordinarily no meaningful distinctions can be drawn between information-gathering activities under § 104(b), the drilling of monitoring wells, the installation of treatment facilities, or any other action

authorized by CERCLA. The following discussion should clarify the appropriate way of handling certain common situations.

a. Pre-Remedial Investigation

When a site is initially identified the Agency may need to obtain access to a particular property to inspect it and make a preliminary assessment, or to define the extent of the problem, determine the threat to public health, and determine what options are available. The Agency believes that pre-remedial activities that can be characterized as Preliminary Assessment/Site Inspection (PA/SI) or Remedial Investigation/Feasibility Study (RI/FS) generally will not constitute compensable takings. By definition, such activities are undertaken to protect public health and safety, and thus fall squarely within the nuisance exception. This applies even if a property turns out to be free of contamination; the government's action is no different from exercising a valid warrant, searching a property, and failing to locate the object of the search.

At this stage, the Agency may lack sufficient information to determine whether the property is contaminated or whether its owner is potentially liable for response costs. At the same time, a site ordinarily cannot be remediated until the pre-remedial work is complete. Consequently, the Agency's first priority must be to obtain access and commence necessary pre-remedial work as expeditiously as possible, regardless of whether some response activity might constitute a taking for which a property owner should ultimately be compensated.

Ideally, the owner of a property will voluntarily grant the Agency access for pre-remedial work. However, some owners may attempt to make access conditional on compensation. In such cases, the Agency must recognize that the Fund is only available to pay necessary response costs, and thus cannot be used to compensate a property owner for use of his property unless CERCLA, the Fifth Amendment, or some other authority authorizes such compensation. Moreover, EPA can obtain access to property to carry out response activities under CERCLA regardless of whether compensation is required under the Fifth Amendment. If EPA has a substantial basis for concluding that its activities constitute a compensable taking, (for example, where it uses off-site property for a staging area), it should attempt to negotiate a fair payment for use of the property. However, it should not delay access while attempting to determine whether compensation is appropriate or negotiating the amount of such compensation.

Where consent cannot be promptly obtained, the Agency should defer compensation questions and proceed without consent by obtaining an administrative access order. The Agency and the owner can then continue negotiating after the Agency obtains access and commences work. Alternatively, the property owner can

pursue a takings argument in an inverse condemnation action in the Claims Court. A landowner who prevails in such an action is entitled to full compensation for any loss of property, including interest, from the date of the taking. See First English, 107 S.Ct. 2378. This process enables EPA to proceed with its response activities without delay, while assuring full compensation to the property owner.

b. Remedial Action

By the time the Agency has completed pre-remedial activities and is preparing to commence construction, takings questions should generally be resolved. The facts regarding the site should be sufficiently well-developed that it is possible to determine with some confidence whether a release or threatened release is present on the property and whether or not the proposed response activities will give rise to a compensable taking. Ordinarily, therefore, before site work begins the Agency should either have resolved the compensation question or concluded that no resolution is possible and elected to proceed without consent and to litigate.